

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCUS RUBEN ELLINGTON,

Plaintiff, No. CIV S-04-666 JAM KJM P

vs.

E.S. ALAMEIDA, et al.,

Defendants. FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prison inmate proceeding on a third amended complaint which alleges that defendants Sweeten and Barron solicited inmates to harm plaintiff while he was housed at High Desert State Prison. Defendants answered the third amended complaint on May 18, 2009. Plaintiff has filed a motion for a preliminary injunction and a motion for judgment on the pleadings.

I. Motion For Preliminary Injunction

Plaintiff alleges that Dr. Patel, acting in essence as agents of the defendants, is planning to remove plaintiff's walker and wheelchair and revoke his status as a disabled inmate in retaliation for the claims against defendants.

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1 Dr. Patel is not a defendant in this law suit. This court is unable to issue an order  
2 against individuals who are not parties to a suit pending before it. See Zenith Radio Corp. v.  
3 Hazeltine Research, Inc., 395 U.S. 100, 112 (1969).

4 Plaintiff appears to be attempting to circumvent this restriction by suggesting that  
5 defendants are acting vicariously through Dr. Patel. However, in Devose v. Herrington, 42 F.3d  
6 470 (8th Cir. 1994), the inmate plaintiff sought an injunction preventing the defendants from  
7 filing false disciplinary charges and taking other actions in retaliation for the underlying lawsuit  
8 based on a denial of medical care. The Court of Appeal observed:

9 [A] party moving for a preliminary injunction must necessarily  
10 establish a relationship between the injury claimed in the party's  
11 motion and the conduct asserted in the complaint. It is self-evident  
12 that Devose's motion for temporary relief has nothing to do with  
13 preserving the district court's decision making power. . . .  
14 Although these new assertions might support additional claims  
15 against the same prison officials, they cannot provide the basis for  
16 a preliminary injunction in this lawsuit.

17 Id. at 471 (citations omitted); see also Omega World Travel v. Trans World Airways, 111 F.3d  
18 14, 16 (4th Cir. 1997); Lebron v. Armstrong, 289 F.Supp.2d 56, 61 (D. Conn. 2003).

19 **II. Motion For Judgment On The Pleadings**

20 Plaintiff alleges that he is entitled to judgment against Sweeten on the pleadings  
21 because Sweeten's answer is "a FEIGNED one. and as such, serves as failure to answer."  
22 Docket No. 205 at 2 (reproduced as in original). As proof of this, plaintiff offers his own  
23 complaint and his hearsay account of what other inmates told him about the incidents that form  
24 the basis of the third amended complaint.

25 Unlike a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure,  
26 either party may make a motion for judgment on the pleadings under Rule 12(c). Qwest  
Communications v. City of Berkeley, 208 F.R.D. 288, 291 (N.D. Cal. 2002). Otherwise, the  
motions are "functionally identical." Dworkin v. Hustler Magazine, 867 F.2d 1188, 1192 (9th  
Cir. 1989). Accordingly, a court considering a motion under Rule 12(c) must deem the

1 allegations of the non-moving party to be true just as it would on a 12(b)(6) motion. Hal Roach  
2 Studios v. Richard Feiner and Company, 896 F.2d 1542, 1550 (9th Cir. 1990). Judgment on the  
3 pleadings is appropriate “when the moving party clearly establishes on the face of the pleadings  
4 that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter  
5 of law.” Enron Oil Trading & Transportation Company v. Walbrook Insurance Company  
6 Limited, 132 F.3d 526, 529 (9th Cir. 1997) (internal citation, quotation omitted).

7 Defendant Sweeten has denied most of plaintiff’s factual allegation, but as to  
8 plaintiff’s description of the injuries he suffered when fighting with cellmate Dennis, defendant  
9 said he did not have sufficient information to admit or deny this claim. Docket No. 201 ¶ 4.  
10 This court must believe defendant Sweeten’s denial that he solicited inmates to assault plaintiff  
11 and otherwise spread false information about plaintiff in an attempt to have plaintiff attacked.  
12 Plaintiff’s attempts to rebut this by using facts outside these pleadings is unavailing and only  
13 demonstrates that there are material issues of fact to resolve before judgment can be entered.

14 IT IS THEREFORE RECOMMENDED THAT:

15 1. Plaintiff’s motion for a preliminary injunction (docket no. 208) be denied; and  
16 2. Plaintiff’s motion for judgment on the pleadings (docket no. 205) be denied.

17 These findings and recommendations are submitted to the United States District  
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
19 days after being served with these findings and recommendations, any party may file written  
20 objections with the court and serve a copy on all parties. Such a document should be captioned  
21 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
22 shall be served and filed within ten days after service of the objections. The parties are advised

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1 that failure to file objections within the specified time may waive the right to appeal the District  
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 10, 2009.

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5 U.S. MAGISTRATE JUDGE

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